SUPREME COURT, U.S.
FILED
MAR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

89- 1446

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

———

AHTNA, INC.,

Petitioner,

v.

STATE OF ALASKA
UNITED STATES OF AMERICA
WILLIAM CLARK, SECRETARY OF THE INTERIOR
ROBERT PENFOLD, ALASKA STATE DIRECTOR,
BUREAU OF LAND MANAGEMENT,

Respondents.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———

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QUESTION PRESENTED

Whether Congress' incorporation by reference of the Submerged Lands Act of 1953 into the Alaska Statehood Act should be read as defeating the claims of Alaska Natives to submerged lands when Section 4 of the Alaska Statehood Act explicitly saves the entire issue of Native land claims to be handled by Congress at a later date.

STATEMENT UNDER RULE 29.1

The following are subsidiaries of Ahtna, Inc.:

Ahtna Construction and Primary Products Co.
Ahtna Development Corporation
Ahtna Enterprises, Inc.

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BUREAU OF LAND MANAGEMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Ahtna, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 13, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, not yet reported, appears in Appendix A to this petition (App. A, at 1a). The opinion of the United States District Court, reported at *Alaska v. United States*, 662 F. Supp. 455 (D.Alaska 1987), also appears in Appendix B (App. B, at 12a).

JURISDICTION

This Court has jurisdiction to review the judgment below by writ of certiorari under 28 U.S.C. § 1257. The United States Court of Appeals for the Ninth Circuit entered judgment in this case on December 13, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Sec. 8, provides:

> The Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . .

The following statutory provisions involved are set forth in Appendix D:

1. Submerged Lands Act of 1953, 43 U.S.C. § 1311 (App. D, at 42a).
2. Alaska Statehood Act, 48 U.S.C. note prec. § 21 (App. D, at 43a).
3. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (App. D, at 44a).
4. Alaska National Interest Lands Conservation Act, 43 U.S.C. §§ 1631 *et seq.* (App. D, at 47a)

5 Alaska Constitution, Article VIII (App. D, at 52a).

STATEMENT OF THE CASE

A. Concise Statement of the Case

This case concerns the way in which the Alaska Statehood Act, 48 U.S.C. note prec. § 21, handled the land claims of Alaska Natives. This case affects the land entitlements of tens of thousands of Alaska Natives. The problem here relates to the disposition at the time of Statehood of lands submerged under navigable waters.

In applying *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) to the question of Congress' intent

in the Alaska Statehood Act, one must take two aspects of Alaska's uniqueness into account. One is its size, and the other is the unique circumstances of its Native peoples, including the vast array of land claims they had at the time of statehood. It would have been impossible for Congress to determine Alaska Native claims to submerged lands on an individual basis at that time. Therefore, the only appropriate resolution of the internal tension in the Statehood Act is to infer that Congress intended to assign itself the responsibility of deciding any submerged land claims of Alaska Natives at the same time as it would legislate all other Native land claims.

In this test case the title of Ahtna, Inc. (hereafter "Ahtna"), an Alaska Native corporation organized under the Alaskan Native Claims Settlement Act (hereafter "ANCSA"), 43 U.S.C. §§ 1601 *et seq.*, to certain submerged lands beneath the Gulkana River granted to Ahtna's predecessor in interest by the United States, is challenged by the State. The question presented is whether Native claims to all types of Alaskan lands were protected by Section 4 of the Alaska Statehood Act, so that submerged lands could subsequently have been validly granted by the United States to Ahtna under ANCSA.

B. Facts of the Case

Alaska's unique status as the one state which is a subcontinent is, as here, often overlooked. The State has twenty percent of the total land area of the United States, most of America's continental shelf, the greatest part of its coastline, hundreds of millions of acres of wilderness and untold resources. At the same time its population is the smallest of the fifty states and is concentrated in a few urban centers, ENCYCLOPEDIA BRITANNICA, Vol. I (1976), at 409-417.

Whether Alaska should have become a State in 1959 is perhaps still debatable. Naske, AN INTERPRETIVE HIS-

TORY OF ALASKAN STATEHOOD (1973). There is no question that it entered the Union with many handicaps. Not the least was its immense area and the little knowledge of what that implied for the State's people and its resources.

On the road to Statehood, extraordinary schemes, disadvantageous to the State and all of its various peoples, were actively considered as a way of creating economic growth. Rogers, CHANGE IN ALASKA (1970).

Instead, Congress, in Section 6 of the Statehood Act, sought to sustain the State with a land grant of 102,000,000 acres and certain rights to submerged lands. It also recognized that not every problem facing Alaska could be solved at Statehood. Not the least of these involved the status and land claims of Alaska's Native peoples, the Eskimos, Indians and Aleuts.

Something special needed to be done to Alaska's Natives. Native health was suspect. The average age of death was thirty-five. Native housing was sub-standard. Native unemployment was among the nation's worst. Federal Field Committee, ALASKA NATIVES AND THE LAND (1968), at 1-84.

Of critical relevance to this case, understanding Native land rights would have required considering much of the State for aboriginal title. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982), at 739-46. Because aboriginal title requires knowledge of Native use and occupancy and is often defined by hunting, fishing and travel patterns, greater knowledge of Native life than that which was possessed in 1959 was critical.

Even to this day, the United States Geological Survey concedes that "Alaska's lakes are so numerous they are essentially uncounted." United States Geological Survey, ACTIVITIES OF THE ALASKA DISTRICT (Anchorage, 1987). And it was known that Alaska had "literally thousands of river and stream systems." Federal Field Committee,

supra, at 330. To further complicate things, at the time of Statehood, little of the State had been surveyed and by the mid-1980's, eighty percent remained unsurveyed. Alaska Land Use Council, ESTIMATES OF LAND TO BE SURVEYED (1984).

Instead of extinguishing Native claims, Congress chose to elect the status quo until it could sort through problems. Its choice is clearly spelled out in Section 4 of the Statehood Act, wherein Congress reserved from award to the State any land "the right of title to which may be held by" Alaska Natives, and said such lands would remain in the control of the United States "until disposed of under its authority." Section 4, 48 U.S.C. note prec. § 21.

As events took shape and Alaska began to pursue its claims to the land which had been granted to it under Statehood Act entitlements, Section 6, 48 U.S.C. note prec. § 21, the problem deferred became a crisis. Natives were concerned that their lands were being taken and their subsistence and culture destroyed by the State; numerous Native protests encompassing virtually all of Alaska were lodged with the Department of Interior. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1017 (D.Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied sub nom. Inupiat Community of Artic Slope v. Atlantic Richfield Co.*, 449 U.S. 888 (1980).

In 1966, Secretary of Interior Stewart Udall froze the land from further State selection and conveyance pending a resolution by Congress of the matter. In 1967, the State chose to force the issue by challenging the land freeze. In *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970), the Ninth Circuit upheld the Secretary's action. The court said that State selections under Section 6 must be tested for Native use and occupancy under Section 4. If such Native uses were found, the Court indicated that they would defeat State selection for the tract at issue. The court

recognized the complexity of the litigation and suggested that on remand the District Court could stay any further proceedings, while Congress sought to resolve the issue. Case, ALASKA NATIVES AND AMERICAN LAWS (1984), at 69.

The Ninth Circuit's decision in *Alaska v. Udall, supra,* is directly contrary to its decision in the present case. Had that decision occurred in another circuit, there would be presented to this Court the type of conflict between circuits that is a classic indicator of a grant of certiorari.

Congressional action came in 1971 with the passage of ANCSA. That Act extinguished Native claims to all lands, including "submerged land," 43 U.S.C. § 1603(b), in exchange for a land grant of 43 million acres, including land already selected and patented to the State, and a monetary settlement.

In the following years, Native Regional corporations, including Ahtna, and Native village corporations, including Sta-Keh (Gulkana), were formed. Their responsibilities included implementing ANCSA by making land selections pursuant to ANCSA. In 1979, the United States Department of the Interior made an interim conveyance of submerged lands to the Sta-Keh Corporation, the Village corporation for Gulkana, Alaska, organized pursuant to ANCSA. These are the lands at issue in this case. In 1980, Sta-Keh and Ahtna merged and Ahtna succeeded to the village's entitlement.

Subsequent reports demonstrate a growing fear among Natives that their ANCSA settlement was in jeopardy. Berger, VILLAGE JOURNEY (1985). Ahtna had faced this possibility earlier because, in 1980, the State filed this suit in the United States District Court for Alaska contesting Ahtna's title and claiming that the land belonged to it pursuant to the Statehood Act. The basis of federal jurisdiction was 28 U.S.C. § 1331.

C. Proceedings Below

The case was considered by three federal district judges between 1980 and 1987. Judge James Fitzgerald of the District of Alaska guided the parties through five years of pretrial procedures. During this period, the parties stipulated to facts involving the Gulkana River's condition and history. In 1984, the United States disclaimed interest in the case. In 1985, Alaska voluntarily dismissed its claim to federally-held lands under the upper reaches of the Gulkana River system. The case was subsequently transferred to Senior Judge James A. von der Heydt, reassigned to Judge Fitzgerald and then assigned to visiting Judge Laughlin E. Waters.

In *Alaska v. United States, supra,* Judge Waters chose to consider the case on Alaska's Motion for Summary Judgment filed in 1983. Judge Waters held that the State of Alaska received at Statehood title to all lands submerged beneath navigable waters of the State and that the stipulated facts established as a matter of law that the waterbody covering Ahtna's interim conveyance was navigable for title purposes. The court's final judgment voided Ahtna's interim ANCSA conveyance from the United States and vested title to the parcel of submerged land in the State of Alaska.

Ahtna appealed. In December, 1989, the Ninth Circuit affirmed the decision of the District Court. The Court of Appeals, citing *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), rejected Ahtna's argument about the primacy of Native Section 4 Statehood Act rights over Alaska's Section 6 Statehood Act entitlements.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD DECLARE THAT, CONTRARY TO THE DECISION BELOW, SUBMERGED LANDS SUBJECT TO NATIVE CLAIMS WERE OUTSIDE THE SCOPE OF ALASKA'S STATEHOOD GRANTS AND THEREBY SELECTABLE BY NATIVES UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.

Certiorari must be granted if the rights of Alaska Natives to a full and complete land claims settlement, as anticipated by the Alaska Statehood Act and guaranteed by ANCSA, are to be realized. The question at issue goes directly to the type of settlement Natives had reason to expect. Will it be complete and include *all lands* which they are entitled to select, or will the State of Alaska compromise the Natives' entitlement by stripping submerged lands from their land selection pool? The answer to this question involves the rights of every Alaska Native.

The case was made more complex than necessary, because for a significant period of time the United States was a full party in interest. Accordingly, issues of navigability consume much of the record below. In addition, because of a plain error by the District Court in its recitation of the navigability standard in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), it was necessary that the reasoning and the erroneous citation be corrected. The Ninth Circuit did so at note 3 to its opinion, *Alaska v. Ahtna*, No. 87-3555 (App. A, at 1a).

With that issue now settled, Ahtna's underlying contention becomes the final and appropriate focus. In this regard, it has long been established that Congress can defeat a State's submerged land entitlement by reservation of land for the benefit of Indian and other public purposes. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (creation of reservation implicitly

transferred title to riverbed to the tribe); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947) (treaty awarded control of riverbed and tidelands to tribe); *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942) (lake bed held in trust for tribe). The only question here is whether Congress so acted in this case.

Ahtna's analysis necessarily begins with the Alaska Statehood Act. That Act explicitly grants Alaska the right to select and receive from the federal government over 102 million acres of the

> . . . public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection.

Section 6(b), 48 U.S.C. note prec. § 21. The Act also provides, very simply:

> The Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the State shall have the same rights as do existing States thereunder.

Id. at § 6(m).

These provisions are, however, not the end of the story. The grants of land to Alaska were not unconditional. Congress required the State of Alaska and its people to disclaim any interest in or right to federal lands in Alaska that were not granted,

> . . . and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives;

Id. at § 4, and further required the State and its people to agree

> . . . that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States

> in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority except to such extent as the Congress has prescribed or may hereafter prescribe, ...

Id.

It is apparent that Sections 4 and 6 of the Statehood Act are in some tension. The issue is whether Section 6 should be read as "trumping" Section 4 and confirming the new State's rights to all relevant submerged lands, or whether, as Petitioner strongly believes, the only sensible reading is that Native claims to submerged lands were to be saved out of the generalized grant and kept as part of the land claims that Congress would address at a later date.

Subsequent case law firmly establishes that the statutory disclaimer of Native lands and property is a disqualification of parcels held under Native rights of use and occupancy from the category of "vacant, unappropriated, and unreserved" lands subject to Alaska's largest grant of selection rights, unless Congress provides for the extinguishment of Native rights. *See Alaska v. Udall*, *supra*; *United States v. Alaska*, 197 F.Supp. 834 (D.Alaska 1961); *Edwardsen v. Morton*, 369 F.Supp. 1359 (D.D.C. 1973). Case law also verifies that the State's land entitlements are subordinate to pre-statehood conveyances and withdrawals for any valid public purpose. *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); *see also United States v. Atlantic Richfield Co.*, *supra*, 435 F. Supp. at 1017 n.30 (Public Land Order No. 4582, issued January 12, 1969, was a suspension of Alaska's land selection entitlements by the federal executive in order to allow ". . . for the determination and protection of the rights of the Native Aluets, Eskimos and Indians of Alaska.").

In 1971, in ANCSA, Congress extinguished the Alaska Natives' aboriginal property rights and provided for the

distribution of more than forty-three milion acres of federal public lands in Alaska, along with other compensation, in settlement. Of particular importance to the question here, Congress specifically extinguished aboriginal rights, "if any," to "submerged land underneath all water areas, both inland and offshore," 43 U.S.C. § 1603(b). The clear implication of this extinguishment is that Congress believed aboriginal rights to submerged lands in Alaska may have existed and been saved by the Statehood Act from transfer to the State at that time.

Thus, even though Congress in the Alaska Statehood Act expressly applied the Submerged Lands Act and granted Alaska "the same rights as . . . other states thereunder," any lands that were possibly subject to aboriginal title would not have vested in the State because Alaska consented to exclusive United States control and jurisdiction over all potential Native lands

> . . . until disposed of under its authority except to such extent at the Congress has prescribed or may hereafter prescribe . . . .

Section 4, 48 U.S.C. note prec. § 21.

The clear language of ANCSA, from the statement of Congressional purposes to the definition of lands available for Native selection to the description of selection and conveyance procedures, definitely declares that the entitlements of Alaska Native Village Corporations are superior to the grants to the State of Alaska under Section 6 of the Statehood Act, including the grant of submerged lands under Section 6(m). That Congress had the constitutional authority to prefer Native Village sellections is indisputable; that Congress indeed exercised that authority is shown by the terms of ANCSA, enacted in response to the public exigency created by the pressure for settlement of Native land claims.

An examination of the structure of ANCSA confirms the conclusion that the Alaska Statehood Act must have

been intended to exclude Native Claims to submerged lands from the grant of such land to the new State.

To begin with, Congress intended ANCSA to fulfill its "immediate need for fair and just settlement of *all* claims by Natives and Native groups of Alaska, based on aboriginal land claims. . . ." 43 U.S.C. § 1601(a). (Emphasis added). Congress further intended that

> the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, ...

Id. at § 1602(b).

In order to accomplish the settlement and provide the Natives the maximum participation in land conveyance decisions, Congress established a pool of lands available for Native selection. The first step was to define the category of "public lands" for the purposes of ANCSA. *See id.*, at § 1602(e):

> . . . "Public lands" means *all* Federal lands and interests therein located in Alaska *except*: (1) the smallest practicable tract . . . enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under *Section 6(g)* of the Alaska Statehood Act, as amended, or identified for selection by the State prior to January 17, 1969; . . . .

(Emphasis supplied.) Congress did not exclude submerged lands, navigable or not, from this definition.

Congress then withdrew a portion of the "public lands" from appropriation under the public lands laws and from selection under the Statehood Act. *Id.* at § 1610(a)(1). The particular public lands withdrawn are those townships enclosing and surrounding Native villages eligible for land benefits under ANCSA, *id.*, at § 1610(a)(1)

(A)-(C), excluding only National Park lands and lands withdrawn for national defense purposes. Again, Congress declined to segregate submerged lands, navigable or not.

In the following section of ANCSA, Congress mandated that

> . . . the Village Corporation for each Native village identified pursuant to section 1610 of this title *shall select*, in accordance with rules established by the Secretary, *all of the township or townships in which any part of the village is located*, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title; . . . .

Id., at § 1611(a)(1) (Emphasis supplied.) Yet, again, presented with an opportunity to exclude submerged lands from the pool of lands available to the Village Corporations, Congress declined to so limit village selection rights.

To be sure, Congress refers to lands covered by water elsewhere, as in § 1611(a)(2). There, however, Congress describes tracts "separated by bodies of water *or* by lands which are unavailable for selection," and provides

> . . . [t]hat the Secretary in his discretion *and upon the request of the concerned Village Corporation*, may waive the whole section requirement where—
>
> > (A)(i) a portion of available public lands of a section is separated from other available public lands in the same section by lands unavailable for selection *or* by a meanderable body of water; . . . .

Id. (Emphasis supplied.) The clear implication of this and similar language elsewhere in ANCSA is that the category of lands "unavailable for selection" does not include lands beneath bodies of water, meanderable or not.

Nothing in ANCSA dispels the inference that Village Corporations are entitled to select submerged lands whether or not the state has inchoate rights thereto. With the exception of the clear statement in 43 U.S.C. § 1603(a) that prior patents and tentative approvals of state selections under section 6(g) of the Statehood Act shall be retroactively deemed to extinguish aboriginal title, wherever in ANCSA Congress refers to the selection rights of the state, one finds nearby a statement that those rights are subject to the selection rights of Natives under ANCSA. For example, 43 U.S.C. § 1616 allows the State and the Native Regional Corporations to initially identify lands "desired to be selected,"

> . . . *Provided*, That selection of lands by Village Corporations pursuant to section 1611 of this title shall not be affected by such withdrawals and such lands selected may be patented and such rights granted as authorized by this chapter . . . .

Id., at § 1616(d)(2)(E) (Emphasis in original.)

Even the subsequent Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, expressly provides:

> All conveyances to the State under section 6 of the Alaska Statehood Act, this Act, or any other law, shall be subject to valid existing rights, to Native selection rights under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 *et seq.*], and to any right-of-way or easement reserved for or appropriated by the United States prior to selection of the underlying lands by the State of Alaska.

43 U.S.C. § 1635(*l*)(1).

Notwithstanding, in its Opinion below the Ninth Circuit held that the subsequently decided *Utah Div. of State Lands v. United States*, *supra*, defeated Ahtna's argument because Congress did not "clearly" intend to exclude Native lands, nor had it acted affirmatively in excluding the lands when it passed the Statehood Act.

The Ninth Circuit erred in its analysis. First, it absolutely failed to take into account the uncharted nature of much of Alaska's land. Congress can only identify that which is known to exist. "Uncounted lakes" are nothing less, and coupled with "literally thousands of river and stream systems," the resulting legislation would have required enormously long listings. Moreover, Utah, the test state, is one of the most arid in the nation. Alaska's hydrology and geography demand a different application of *Utah Div. of State Lands v. United States*, *supra*.

Second, as the Ninth Circuit understood in 1968 in *Alaska v. Udall*, *supra*, these listings would have had to be individually tested one by one for aboriginal title if they were to be excluded. Under the Ninth Circuit's latest standard, the legislation would have had to fill volumes in order for Congress to make findings as to each piece of submerged land that might be subject to Native claims. That, however, was not what Congress chose. Instead, it opted for deferral.

In fact, it could not have been clearer when in the report to accompany the Statehood Act, over three decades ago, Congress in reference to Section 4 stated that:

> Finally, the section provides that *no attempt* will be made to deal with the legal merits of the indigenous rights but to *leave the matter in status quo* for either future legislative action or judicial determination.

Reported in Vol. I, Alaska Statutes, 1962 (1988 ed.) at pp. 147, 168. (Emphasis supplied.) This strongly indicates Congress' intent at the time of Statehood to leave everything that might be the subject of a Native claim to later resolution.

Thus, it is absolutely clear that Congress at the time of Statehood intended a *blanket* exemption for any submerged land issue or other issue relating to Native claims pending future action. It is harder to conceive of a more unambiguous and affirmative reservation. The

Ninth Circuit got it right in *Alaska v. Udall* and this Court denied certiorari. This time the Ninth Circuit has gotten it wrong, and this Court needs to step in.

The sum total of Congress' action leads to the conclusion that the United States at the time of Statehood retained in federal ownership *all* federal lands which may have been subject to aboriginal titles in order that Congress could resolve Native land rights later on. The resolution occurred in ANCSA, a statute passed for the benefit of the Alaska Natives, *see Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 671 (D. Alaska 1977), in response to the public exigency arising from the possibility of aboriginal claims to virtually all of Alaska. *United States v. Atlantic Richfield Co., supra.*

The Congressional scheme establishes a pool of federal lands available for Native selection with specific and express exclusions. Submerged lands, whether navigable or not, do not appear among those exclusions. The provisions which do refer to submerged lands repeatedly and consistently imply that Village Corporations may obtain title thereto, while other provisions expressly declare that the rights of Alaska under the Statehood Act are subject to the selection rights of the villages. Thus, under the established law of federal land conveyances, submerged lands must be available for Native selection, so that justice may be complete for the Alaska Natives and so that their land claims settlement be kept intact. This in turn means that the conveyance of the land by the United States to Sta-Keh in 1979 was valid and that the courts below were incorrect in ruling for the State of Alaska.

The decisions below have left Alaska's Natives in an inequitable position. The Ninth Circuit's application of *Utah Div. of State Lands v. United States*, to the Alaska Statehood Act failed to take into account Alaska's unique size and the interaction of that phenomenon with Con-

gress' clear decision to put off resolution of Alaskan Natives' land claims until a later date. Failure to reverse the Ninth Circuit's error will adversely and unjustly affect thousands of Alaskan Natives. This Court should grant certiorari and reverse the unjust and incorrect result reached below.

CONCLUSION

For the reasons stated in this petition, this Court should issue a writ of certiorari.

Respectfully submitted,

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March 13, 1990

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-3555
D.C. No. A-80-359-CIV

STATE OF ALASKA,
Plaintiff-Appellee.
v.

AHTNA, INC.; and STA-KEH CORPORATION,
Defendants-Appellants,

and

UNITED STATES OF AMERICA;
WILLIAM CLARK, Secretary of the Interior;
ROBERT PENFOLD, Alaska State Director,
Bureau of Land Management,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska
Laughlin E. Water, District Judge, Presiding

Argued and Submitted
August 8, 1989—Anchorage, Alaska

Filed December 13, 1989

Before: Diarmuid F. O'Scannlain, Edward Leavy and Stephen S. Trott, Circuit Judges.

Opinion by Judge Leavy

COUNSEL

Robert M. Goldberg, Robert M. Goldberg & Associates, Anchorage, Alaska, for the defendants-appellants.

Kenneth C. Powers, Assistant Attorney General, Anchorage, Alaska, for the plaintiff-appellee.

Blake Watson, Department of Justice, Washington, D.C., for the defendants-appellees.

David C. Crosby, Council & Crosby, Juneau, Alaska, for the amicus.

Geoffrey Y. Parker, Anchorage, Alaska; Michael W. Sewright, Burr, Pease & Kurtz, Anchorage, Alaska, for the amicus.

Jan S. Stevens, Supervising Deputy Attorney General, Sacramento, California, for the amicus.

OPINION

LEAVY, Circuit Judge:

OVERVIEW

The Bureau of Land Management ("BLM") conveyed the lands underlying 30 miles of the lower Gulkana River Ahtna, Inc. ("Ahtna"), a native regional corporation under the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C.A. §§ 1601-1629(e) (West 1986 & Supp. 1989). The district court set aside the conveyance, holding that that segment of the Gulkana was

navigable when Alaska became a State in 1959, and therefore, the underlying lands were the property of Alaska, not subject to conveyance by the federal government. Ahtna appeals. We affirm.

FACTS AND PROCEEDINGS

The facts are not disputed. The Gulkana River System ("the River" or "the Gulkana") is composed of clear water streams located in southcentral Alaska. The River flows through diverse lands containing tundra, spruce forests, and lakes. It displaces 3,600 to 4,800 cubic feet per second from May to September, decreasing to 200 to 300 cubic feet per second from November through April, when the River lies frozen. The parties stipulate that the physical characteristics of the River, such as water volume, gradients, geology, and general weather, are the same as they were when Alaska became a State in 1959.

The part of the River at issue in this case is its lower 30 miles ("the lower Gulkana"), extending from Sourdough Campground (River mile 33.5) to the River's mouth at the Copper River (mile 0). The shallowest part of the River, at mile 3.75, is normally a foot and a half deep, diminishing to a foot during low-flow season. On average, however, the River in these lower 30 miles is 125-150 feet wide and 3 feet deep.

The parties agree that today, between mile 3.75 and mile 30, and between mile 0 and mile 3.5, the River is customarily used, or is susceptible to use, by the following types of water-craft: (1) flat or round-bottom aluminum or fiberglass powerboats 16 to 24 feet long by 4 to 10 feet wide, capable of carrying loads between 900 and 2,000 lbs.; (2) inflatable rafts between 12 and 15.5 feet long by 4 to 7 feet wide, with a capacity of 1,250 to 2,000 lbs.; and (3) square-sterned motorized freight canoes and double-ended paddle canoes 15 to 20 feet long, capable of carrying loads of 500 to 900 lbs.

In the years immediately preceding Alaska's admission into the Union, from the 1940's to 1959, hunters and fishermen travelled the River in powered 16 to 24-foot fiberglass and aluminum watercraft. The watercraft had a load capacity of approximately 1,000 lbs.

Most of the use of the River is recreational. On a typical busy weekend day in June or July, 20 boats will use the lower 30 miles of the River, carrying approximately 60 people.

Since the 1970's it has been possible to take guided fishing and sightseeing trips on the River. The industry employs watercraft of the type stipulated to be customarily used in the Gulkana, that is, 20 to 24-foot long aluminum powerboats and 12 to 15.5 foot long inflatable rafts. Today, the industry employs over 400 people. Rafts usually carry five passengers and one guide, providing for a load often in excess of 1,000 lbs. Average fare is $150.00 per passenger.

On May 16, 1979, the BLM made an administrative decision finding that (1) the lower Gulkana River was not navigable, and (2) that the underlying submerged lands were federally-owned property subject to conveyance to village corporations under ANCSA.[1] *Alaska v. United States*, 662 F. Supp. 455, 456-57 (D. Alaska 1987). The BLM thereafter made an interim conveyance of the submerged lands of the lower Gulkana to Ahtna, a native regional corporation organized under ANCSA.[2]

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[1] ANCSA was designed to provide a fair and just settlement of the claims by Alaska natives, 43 U.S.C. § 1601(a), following ANCSA's extention of aboriginal titles. 43 U.S.C. § 1603. To accomplish the settlement ANCSA withdrew certain lands from appropriation under the public lands laws and the Statehood Act, and made these lands available for selection to Alaskan village corporations. 43 U.S.C. §§ 1610, 1611. Conveyance of these lands to the corporations followed selection. 43 U.S.C. § 1613.

[2] The interim conveyance was made to Sta-Keh Corporation, a village corporation. Sta-Keh subsequently merged with Ahtna, a regional corporation, making Ahtna the title-holder.

The State of Alaska challenged the conveyance to Ahtna. States generally hold title to the lands underlying navigable rivers within their boundaries. *Utah v. United States*, 482 U.S. 193, 196 (1987). Alaska maintained before the district court that the lower Gulkana was navigable, that title to the underlying lands belonged to Alaska, and that the BLM's conveyance was therefore void. *Alaska v. United States*, 662 F. Supp. at 456. The parties stipulated to all the relevant facts.

The district court granted summary judgment in favor of Alaska. The court concluded that in most cases, including this one, a river functions as a "highway for commerce," and therefore is navigable, if it is capable of transporting people or goods. *Id.* at 466. Since the stipulated facts showed that the lower Gulkana has been and is used for transport of goods and people, the court concluded the portions of the River here at issue were navigable. *Id.* at 467-68.

Ahtna appeals. The United States, which before the district court endorsed the BLM's determinations of non-navigability, now argues as an appellee that the lower Gulkana is navigable but for reasons other than those stated by the district court. Amicus Arctic Slope Regional Corporation joins Ahtna in support of a determination of non-navigability. Amici, affiliates of the National Wildlife Federation, outdoor sports organizations, and several States, join the State of Alaska in support of a decision of navigability.

STANDARD OF REVIEW

The facts are undisputed. We review de novo the granting of summary judgment in favor of Alaska. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 764 (9th Cir. 1986).

DISCUSSION

1. The Navigability Determination

The several States ordinarily hold title to the lands underlying navigable rivers within their boundaries. Two sources of authority justify this rule. One is the "equal footing doctrine," which guarantees to newly-admitted States the same rights enjoyed by the original thirteen States and other previously-admitted States. *Utah v. United States*, 482 U.S. at 196; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). One of these rights is title ownership to the lands underlying navigable rivers. *Utah v. United States*, 482 U.S. at 196; *see also United States v. Alaska*, 437 F.2d 1081, 1084 (9th Cir. 1971).

The second source of authority for the rule is the Submerged Lands Act of 1953. By that act, Congress vested in the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. § 1311(a) (1982). Congress explicitly provided for this rule to apply to Alaska when Alaska became a State in 1959. 48 U.S.C. Chapter 2 ("the Statehood Act") note 6(m) prec. sec. 21 (1982).

Thus, the dispositive issue before the district court was whether the lower thirty miles of the Gulkana were navigable. If navigable, title to the submerged lands passed to Alaska at statehood, and the BLM was without power to convey the lands to Ahtna. If non-navigable, the lands remained federal and available for conveyance to Ahtna under ANCSA.

Whether a river is navigable is a federal question. *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926). The relevant navigability test states as follows:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are sus-

> ceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. (19 Wall.) 557, 563 (1870); *see, e.g., Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 794 (9th Cir. 1982).[3] Although the river must be navigable at the time of statehood, *United States v. Utah*, 283 U.S. 64, 75 (1931) (footnote omitted), this only means that, at the time of statehood, regardless of the actual use of the river, the river must have been susceptible to use as a highway for commerce. *Id.* at 83.

A river's use "need not be without difficulty, extensive, or long and continuous" for the river to be a highway for commerce. *Riverfront Protection*, 672 F.2d at 795 (portion of the McKenzie River found navigable when used to transport "thousands of logs," even though shallow areas and sand bars made the transport difficult). It is not essential that the river be used for transportation of water-borne freight by a carrier whose purpose is to make money from the transportation. *Utah v. United States*, 403 U.S. 9, 11 (1971) (ranchers transporting own cattle from mainland to islands used the rivers as a highway).

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[3] The parties agree the district court misquoted the *Daniel Ball* Navigability test, substituting "trade or travel" for "trade and travel." *Alaska v. United States*, 662 F. Supp. at 463. The district court reasoned from this disjunctive that there was an "implicit equation between routes for travel and routes for conducting commerce," *id.* at 463-64, and that "the travel requirement is indeed the essence of the federal test." *Id.* at 464 (quotation omitted). However, the Supreme Court has often stated that a river's navigability depends on the river's susceptibility to useful commerce. *See, e.g., Holt Bank*, 270 U.S. at 56 ("channel for useful commerce"); *United States v. Utah*, 283 U.S. 64, 82 (1931) ("highway of commerce"). We therefore do not agree the travel requirement is the essence of the federal test, and our decision to affirm the district court rests on our analysis of the *Daniel Ball* test as including an element of commerce.

Indeed, it is not even necessary that commerce be in fact conducted: "The question of . . . susceptibility in the ordinary condition of the rivers, rather than of the mere manner of extent of actual use, is the crucial question. . . . The extent of existing commerce is not the test." *United States v. Utah*, 283 U.S. at 82.

Ahtna and amicus argue that the principal uses of the Gulkana have always been recreational, and that recreational uses do not support a finding of navigability. This argument is unpersuasive. The test is whether the river was susceptible of being used as a highway for commerce at statehood, not whether it was actually so used.

Under the facts of this case, we think the present use of the lower Gulkana is commercial and provides conclusive evidence of the lower Gulkana's susceptibility for commercial use at statehood. The parties agree that in 1970 guided fishing and sightseeing trips began to be conducted with watercraft customary for that time period. A substantial industry of such transportation for profit emerged in the lower Gulkana, which industry today employs approximately 400 people. To deny that this use of the River is commercial because it relates to the recreation industry is to employ too narrow a view of commercial activity. "[N]avigability is a flexible concept and '[e]ach application of the [*Daniel Ball* test] . . . is apt to uncover variations and refinements which require further elaboration.'" *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir. 1985) (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940)).

Our conclusion that the present commercial use of the lower Gulkana provides conclusive evidence of its susceptibility for commerce at statehood follows from the facts stipulated by the parties. The parties stipulated that the River's physical characteristics have remained unchanged since statehood. They also agreed that the watercraft customary for the River's use at statehood included pow-

ered boats with a load capacity of approximately 1,000 lbs. We note that the rafts employed today in the guided and fishing industry have a maximum load capacity of 2,000 lbs. We therefore think that the watercraft customary at statehood could have at least supported commercial activity of the type carried on today, with minor modifications due to a more limited load capacity and rudimentary technology. We therefore conclude that the lower Gulkana was susceptible for use as a highway for commerce at statehood.

II. Reservation of the Riverbed at Statehood

Assuming the lower Gulkana was navigable at statehood, Ahtna argues on appeal that title to the underlying lands did not pass to Alaska because Congress intended to reserve title to the submerged lands of the lower Gulkana for the United States at the time Alaska became a State. Ahtna's argument is based on note 4 of the Statehood Act, which provides:

> As a compact with the United States said State [Alaska] and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State . . . under the authority of this Act, the right or title to which is held by the Unted States . . ., and to any lands or other property (including fishing rights), the right or title to which *may be held* by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives . . . .

48 U.S.C. note 4 prec. sec. 21 (1982) (emphasis added).

According to Ahtna, note 4 meant to reserve the lands underlying Alaska's navigable rivers because ANCSA later provided that Alaskan natives *may have held* title to those lands, bringing them within the reservation of note 4. *See* 43 U.S.C. § 1603(b) (extinguishing "[a]ll abor-

iginal titles, *if any*, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas . . . .") (emphasis added).

Alaska and amici first contend that Ahtna's argument is not properly before this court because it was raised for the first time on appeal. We discuss the merits of Ahtna's argument because the issue is purely legal and the facts are fully developed. *See Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986).

Ahtna's argument fails. The federal government has the power to convey a Territory's lands underlying navigable waters prior to that Territory becoming a State, thereby defeating the future State's right to the lands. *Utah v. United States*, 482 U.S. at 197. The Government could probably likewise reserve unto itself the same lands prior to statehood. *See id.* at 201. Nevertheless, "[g]iven the [federal government's longstanding policy of holding land under navigable waters for the ultimate benefit of the States, . . . [the Supreme Court will] not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself." *Id.* at 202. The party seeking to defeat the State's interest has to show that (1) Congress clearly intended to include land under navigable waters within the federal reservation, and (2) Congress affirmatively intended to defeat the future State's title to such land. *Id.*

In *Utah v. United States*, the Court decided whether the federal government had effectively reserved for itself the bed of the Utah Lake by laws enacted prior to statehood. To meet the first prong of the test, the Court required clear reference to the particular lands in the respective legislation. The court noted that " 'Congress has never undertaken by general laws to dispose of land under navigable waters." *Id.* at 203 (quoting *Shively v. Bowlby*, 152 U.S. 1, 48 (1894)). The bed of Utah Lake was therefore not reserved by a law purporting to reserve " 'all the lands which may hereafter be designated

or selected . . . for sites for reservoirs.'" *Id.* at 198 (quoting the Sundry Appropriations Act of 1888, 25 Stat. 505). The law's generality was not cured by the fact that, prior to Utah's statehood and pursuant to the reservation law, a United States Geological Survey reported the reservation of the "site of the Utah Lake" pursuant to the reservation law, but not *the bed* of the lake.[4] *Id.* at 199, 206-07. The Court concluded that other references to the bed of the lake did not unambiguously reflect congressional intent to reserve the bed of the lake, and so failed to definitely declare "or otherwise [make] very plain" Congress' intention to reserve title to the submerged lands. *Id.* at 207 (quotation omitted).

Ahtna contends that note 4 reserves title to the lands underlying Alaska's navigable rivers to the United States. We are not persuaded that such interpretation of note 4 could survive the first prong of the test articulated in *Utah v. United States*. Note 4 not only omits specific reference to the lands underlying the lower Gulkana, it also omits reference to any submerged lands. Thus, note 4 embodies too general a statement from which we could "infer an intent to defeat [Alaska's] equal footing entitlement." *Utah v. United States*, 482 U.S. at 202. We need not reach the issue of whether note 4 would survive the second prong of the test. *See id.*

CONCLUSION

We will not infer congressional intent to deprive Alaska of its title to submerged lands of navigable rivers within its boundaries based on the geenral language contained in note 4 of the Statehood Act. Because the lower Gulkana was susceptible for use as a highway of commerce at statehood, the lower Gulkana was navigable, and title to its submerged lands vested in Alaska at statehood.

AFFIRMED.

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[4] The reservation law was subsequently repealed, but the repeal did not affect lands already selected, such as the site of Utah Lake. *Utah v. United States*, 482 U.S. at 199.

APPENDIX B

UNITED STATES DISTRICT COURT
D. ALASKA

No. A80-359 Civil (Gulkana River)

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA, DONALD HODEL, Secretary of the Interior; ROBERT PENFORD, Alaska State Director, Bureau of Land Management; AHTNA, INC., and STA-KEH CORPORATION,

Defendants.

April 22, 1987

Harold M. Brown, Atty. Gen., Micheal W. Sewright, Kenneth C. Powers, Asst. Attys. Gen., Dept. of Law, Office of the Atty. Gen., Anchorage, Alaska, for State of Alaska.

Larry Martin Corcoran, Dept. of Justice, Land and Natural Resources Div., General Litigation Section, Benjamin Franklin Station, Washington, D.C., for defendant U.S.

Robert M. Goldberg, Robert M. Goldberg and Associates, Anchorage, Alaska, for defendant Ahtna, Inc.

David C. Crosby, Wickwire, Lewis, Goldmark & Schorr, Seattle, Wash., Baily & Mason, Anchorage, Alaska, for amicus curiae Arctic Slope Regional Corp.

SECOND AMENDED ORDER RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND UNITED STATES' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS

LAUGHLIN E. WATERS, Senior District Judge.

This case raises difficult questions concerning application of the well settled principle that a state is vested with title to the beds underlying navigable waterbodies at the time the state enters the Union. The State of Alaska has filed this suit in part for the purpose of obtaining review pursuant to 43 U.S.C. § 1631 of a determination by the Bureau of Land Management that the lower 30 miles of the Gulkana River is a non-navigable waterway belonging to the United States.[1] Alaska claims that this portion of the Gulkana is navigable and that therefore title to the riverbed has at all times belonged to the State of Alaska. Ahtna, Inc.,[2] to whom the United States transferred purported title to the lower 30 miles of the Gulkana River, is also named by Alaska as a defendant. Presently pending before the court is Alaska's motion for summary judgment and the United States' cross motion for judgment on the pleadings. For the reasons set forth below, the court now grants Alaska's motion and denies the United States' cross motion.

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[1] This court has jurisdiction over this suit pursuant to 28 U.S.C. § 1331. *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 794 (9th Cir. 1982). *See infra* note 6.

[2] As is discussed *infra*, Ahtna, Inc. is a regional corporation organized under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 *et seq.*, and occupies the area in which the disputed portion of the Gulkana River is located. Sta-Keh Corporation, a village corporation organized under ANCSA, was also a transferee of the title conveyed by the United States and is also named as a defendant in this suit. However, Sta-Keh Corporation and Ahtna, Inc. have since merged, with Ahtna, Inc. being the surviving corporation and successor to interest to Sta-Keh Corporation. Answer of Ahtna, Inc., paragraph VII.

Background

The Alaska Native Claims Settlement Act ("ANCSA") permits Native Alaskans to select through regional and village native corporations approximately 44 million acres of public land in Alaska in settlement of aboriginal land claims they had to lands held by the United States at the time Alaska entered the Union. See 43 U.S.C. § 1601 *et seq.* The Alaska Statehood Act, 48 U.S.C. note prec. § 21, permits the State of Alaska to select approximately 103.5 million acres of public land in Alaska. However, under the "equal footing doctrine," *see Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229, 11 L.Ed. 565 (1845), and its codification in the Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.*, title to the beds of navigable inland waterbodies passes from the United States to the state when the state enters the Union. *Utah v. United States*, 403 U.S. 9, 10, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324 n. 19, 94 S.Ct. 517, 525 n. 19, 38 L.Ed.2d 526 (1973), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 794 (9th Cir.1982); *Alaska v. United States*, 754 F.2d 851, 853 n. 3 (9th Cir.), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985). Because title to the beds of navigable waterbodies passed automatically to Alaska at the time of statehood, they are neither available for selection nor chargeable to either the ANCSA or the Alaska Statehood Act entitlements. *See generally*, 43 U.S.C. §§ 1602(e), 1610-1611, 1615, 1631 and 48 U.S.C. prec. 21, Sec. 6(a) and (b). Conversely, the beds of non-navigable waterbodies are available for selection and, if selected, are chargeable against the recipient's entitlement. The United States Department of Interior is responsible for processing the State and native corporation selections and for transferring title to them. *See* 43 U.S.C. §§ 1611, 1613 and 48 U.S.C. prec. 21, Sec. 6(a) and (g). In processing native corporation selections, the

Bureau of Land Management ("BLM") of the Department of Interior makes administrative determinations of navigability. 43 U.S.C. § 1631(b); 43 C.F.R. 2650.5-1(b) (1983); *see Alaska v. United States*, 754 F.2d 851, 852 n. 2 (9th Cir.), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985).

On May 16, 1979, BLM issued an administrative decision finding the lower 30 miles of the Gulkana River system non-navigable. On June 29, 1979, the United States made an interim conveyance pursuant to ANCSA of the same lower 30 miles of the Gulkana River system to Ahtna, Inc., an ANCSA regional corporation. In response, Alaska, on November 25, 1980, filed the instant suit.

In its pleadings, Alaska alleged that the very possibility the United States might declare the portions of the Gulkana River not conveyed to Ahtna, Inc. non-navigable created a cloud over Alaska's title to those portions of the river. As a consequence, in addition to specifically challenging the conveyance of the lower 30 miles of the Gulkana to Ahtna, Inc., Alaska sought by its suit to quiet title in the entirety of the Gulkana River System. Alaska also sought a declaratory judgment[3], pursuant to 28 U.S.C. § 2201, concerning (1) the navigability of the Gulkana River System and (2) the relevancy of the criteria applied by BLM in making navigability determinations while processing claims under ANCSA to Gulkana River System lands. Alaska has since represented to this court that in the event summary judgment was entered in its favor on the quiet title portion of the suit, Alaska

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[3] Alaska also seeks a permanent injunction prohibiting the federal defendants from "patenting, conveying, transferring title to, or otherwise disposing of any land, or interest in land, underlying any part of the Gulkana and connected lakes." Second Amended Complaint, paragraph 5, at p. 12. Alaska has not attempted to demonstrate however that issuance of an injunction is necessary to protect or enforce its substantive legal rights.

would not elect to pursue the portion of the suit seeking the foregoing declaratory judgment[4]. Alaska's Reply to United States' Opposition to Alaska's Motion for Reconsideration at p. 7; Alaska's Memorandum in Support of Motion for Reconsideration at p. 6.

On June 27, 1984, the United States disclaimed pursuant to 28 U.S.C. § 2409a(d) ownership interest in all but the upper reaches of the Gulkana River System. This disclaimer was confirmed by the court on September 24, 1984. On March 1, 1985, the State of Alaska moved to voluntarily dismiss with prejudice any claim to the remaining upper reaches of the Gulkana River System in which the United States still claimed an interest.[5] This motion was granted on March 4, 1985. As a consequence of the United States' disclaimer and Alaska's voluntary dismissal, no concrete dispute remains between the United States and Alaska as to the ownership of the Gulkana River System and the court is without jurisdiction over the United States with respect to the quiet title portion of Alaska's suit. *See* 28 U.S.C. § 2409a(d). However, the Court retains jurisdiction over the United States pursuant to 43 U.S.C. § 1631 to review the Secretary of Interior's determination that the lower 30 miles of the Gulkana River is non-navigable.[6] *See McIntyre v. United*

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[4] Because the declaratory judgment portion of Alaska's suit is not before the Court on these motions, the Court expresses no opinion as to the merits of the request for a declaratory judgment.

[5] Alaska had previously withdrawn its claim to a very small portion of the Gulkana. See Alaska's Withdrawal of Claim, filed February 14, 1986.

[6] The belated suggestion of the United States that this Court lost all jurisdiction over the United States as a consequence of the disclaimer is without merit. 28 U.S.C. § 2409a(d) provides that jurisdiction of the District Court "shall cease" if the United States disclaims interest in the property at issue "unless [the court] has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by [28 U.S.C. § 1346(f) (the statutory grant of jurisdiction over quiet title actions involving

States, 490 F.Supp. 830 (D.Alaska 1980). Moreover, because Ahtna, Inc. did not join in the United States' disclaimer, a live controversy remains between Alaska and Ahtna, Inc. as to title to the lower 30 miles of the Gulkana River System. Ahtna, Inc. has joined in the United States' cross motion for judgment on the pleadings. Ahtna, Inc.'s Opposition to Motion for Summary Judgment at pp. 1-2 (filed June 17, 1983).

Conveyance by BLM of a parcel of submerged land to a Native Corporation is subject to *de novo* review in District Court. *See* 43 U.S.C. § 1631(a). The execution of an interim conveyance by BLM conveying a parcel of submerged land is the "final agency action" with respect to a decision by the Secretary of Interior that the water covering the parcel is not navigable. 43 U.S.C. § 1631(b).

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property in which the United States claims an interest)]." Here the Court has federal question jurisdiction arising under 43 U.S.C. § 1631 and that jurisdiction is independent of the authority conferred by 28 U.S.C. § 1346(f). As a consequence, the disclaimer filed by the United States pursuant to § 2409a(d) does not, by the terms of § 2409a(d), divest this Court of jurisdiction over the United States. It should also be noted that the disclaimer of the United States in no way renders moot Alaska's suit against the U.S. By making its disclaimer the United States did not concede the navigability of the lower 30 miles of the Gulkana River, see "Stipulation Concerning Extent of Gulkana River System Litigation," filed May 2, 1984, nor is there any evidence that BLM has attempted to rescind or disavow its determination that the Gulkana is not navigable.

The jurisdiction of this court over Ahtna, Inc. has not been challenged. The same federal question—that of the navigability of the Gulkana River—is raised by Alaska against both Ahtna, Inc. and the federal defendants. Wholly apart from jurisdiction pursuant to 43 U.S.C. § 1631, federal question jurisdiction has been found to exist in title navigability suits. *See, e.g., United States v. Oregon*, 295 U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267 (1935). This is true even where title to the river bed is not claimed by the federal government, but merely descends from purported fderal title. *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 794 (9th Cir. 1982). Thus, this court unquestionably has jurisdiction over Ahtna, Inc.

Discussion

As indicated above, resolution of the parties' claims turns on the question of whether the contested 30 miles of the Gulkana River System are "navigable" as that term is defined under federal law. The federal test for navigability was first articulated in *The Daniel Ball*[7], 77 U.S. (Wall.) 557, 563, 19 L.Ed. 999 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted in the customary modes of trade or travel on water.

See also Utah v. United States, 403 U.S. 9, 10, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971).

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[7] Under federal law, there are three instances in which the "navigability" of a waterway must be determined: (1) to establish the parameters of the admiralty jurisdiction of a federal court, *The Montello*, 87 U.S. (20 Wall.) at 438 (1874); (2) to define the scope of federal regulatory jurisdiction conferred by authority of the commerce clause, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940); *Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n.*, 644 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 1053, 102 S.Ct. 596, 70 L.Ed.2d 588 (1981); *Gibbons v. Ogden*, 22 U.S. (Wheat) 1, 6 L.Ed. 23 (1824); and (3) to establish title to the waterbed underlying an inland waterway. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842).

The Daniel Ball concerned the parameters of admiralty jurisdiction, not title to the beds of inland waterways. Nevertheless, because the Supreme Court has consistently employed the *Daniel Ball* test in determining "navigability for title," *see, e.g., Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971); *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 79 L.Ed. 1267 (1935); *United States v. Utah*, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931), it is well settled that that test applies in title navigability cases. *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir.), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 794 (9th Cir. 1982).

This much the parties agree on. What the parties disagree about is how the *Daniel Ball* test should be applied. As the United States would have it, a navigability determination would be a two step process: the first step would be to select the customary commercial watercraft in use in Alaska at the time of statehood (the craft that would be selected is referred to by the United States in its papers as the "magic boat"), and the second step would be to examine the river to determine if it is usable by the craft. The State of Alaska, on the other hand, rejects the first step of the United States' two step process. According to Alaska, navigability is not established by identification of a "magic boat" but rather is established by determining (1) the capability of the waterbody to be used for transportation of people or goods from point to point on the water, (2) whether the watercraft used or capable of being used on the waterbody are customary means of transporting people or goods; and (3) whether the use or susceptibilty to use of the waterbody for transporting persons or goods existed in the natural and ordinary condition of the water on the date of statehood.

Careful examination of the positions of the United States and Alaska reveals that the difference between them stems in significant part from differing conceptions of how the *Daniel Ball* test meshes with the equal footing doctrine. The United States' position assumes that the fact that under the equal footing doctrine navigability "at the time of statehood" determines title means that the elements of the *Daniel Ball* test concerning susceptibility to use "as a highway for commerce" "in the customary modes of trade and travel" must be applied with reference to the nature of commerce and the customary modes of travel at the time of statehood. Alaska's position, on the other hand, assumes that the requirement of the equal footing doctrine that a waterway must have been navigable at the time of statehood for title to have passed to the state means only that changes which have

occurred in the physical configuration of the waterway since the time of statehood are to be disregarded for the purpose of determining title navigability. At this stage of the analysis then the court is confronted with the question of how, if at all, the equal footing doctrine bears on application of the *Daniel Ball* test for title purposes.

Navigability was originally created as a legal concept for the purpose of distinguishing those portions of a waterbody which could be privately owned from those portions which could not. *See* MacGrady, *The Navigability Concept in the Civil and Common Law*, 3 Fla.St.U.L.Rev. 511, 511-512 (1975). At common law, navigable waterbodies belonged to the sovereign who held them as a public trust while non-navigable waterbodies were subject to private ownership.[8] *See, e.g., Rex v. Smith*, 99 Eng.

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[8] There is, however, debate as to whether the Crown owned only the beds of waterbodies subject to the "ebb and flow of the tide" or if instead the Crown owned the bed of navigable waterbodies regardless of whether the waterbody was subject to the ebb and flow of the tide. *See* MacGrady, *The Navigability Concept*, 3 Fla. St. U.L. Rev. at 569-587. In the Ninteenth century, American and English courts concluded that in England there are no waterbodies beyond the ebb and flow of the tide large enough to be navigable and that as a consequence in England navigable waterbodies and waterbodies subject to the ebb and flow of the tide were co-extensive. *The Propeller Genesse Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-455, 13 L.Ed. 1058 (1851); *Murphy v. Ryan*, 2 Ir.R.C.L. 143, 151-153 (1868); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). By so concluding, previous cases which held that the Crown held title to the beds of navigable waterbodies were reconciled with cases which had found that the Crown held title only to the beds of tidewaters. The court would note that the assertion that in England there are no waterbodies beyond those subject to the ebb and flow of the tide which are large enough to be navigable seems implausible. *See* MacGrady, *The Navigability Concept*, 3 Fla. St. U.L. Rev. at 571. This, however, is a problem of the English law of title navigability, not the American law of title navigability, because under American law, navigable waterbodies are not limited to those subject to the ebb and flow of the tide. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870); *see infra* note 9.

Rep. 283, 285 (K.B. 1780) ("The soil of a navigable river belongs to the King."); *see also* MacGrady, *The Navigability Concept*, 3 Fla.St.U.L.Rev. at 583-587. Despite the obvious differences between American and English notions of sovereignty, American courts adopted the English common law principle that navigable waterbodies are held by the sovereign in trust for the public.[9] In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842), the Supreme Court found that title to navigable waterbodies in the former colonies, formerly held by the King of England in trust for the public pursuant to the common law doctrine of navigable waterbodies, was by virtue of the Revolution vested in the states. *Id.* at 410; *accord Mumford v. Wardell*, 73 U.S. (6 Wall.) 423, 436, 18 L.Ed. 756 (1867). Thus, as the legal concept of navigability was first transplanted in the original 13 colonies, no violence was done to its underlying purpose: the states stood in the position of the King, holding as a public trust the title to the beds underlying navigable waterbodies.

Other considerations unique to the American system of government came into play when applying the doctrine of

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[9] American courts did not, however, adopt the English definition of navigability, which requires that the waterbody be subject to the ebb and flow of the sea. See note 8, *supra*; *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). American courts declined to adopt the English tidewater test based on the perception that whereas in England no navigable waterbodies were to be found in inland areas unaffected by the tide of the sea, *see supra*, note 8, in the United States "rivers are as navigable for many hundreds of miles above as they are below the limits of tidewater, and some of them are navigable for great distances . . . which are not even affected by the tide at any point during their entire length." *The Daniel Ball*, 77 U.S. (10 Wall.) at 563; *see also The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-457, 13 L.Ed. 1358 (1851). Thus, the differences between the English and American definitions of navigability stem from perceived differences between American and English geography, and not from differing perceptions as to the legal purpose of the concept of navigability.

title navigability to waterbodies lying outside the original 13 colonies. Under the equal footing doctrine, new states "have the same rights, sovereignity and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardell*, 73 U.S. (6 Wall.) 423, 436, 18 L.Ed. 756 (1867); *see also Pollard's Lessee v. Hogan*, 44 U.S. (3 How.) 212, 228-229, 11 L.Ed. 565 (1845). These rights include ownership of the lands underlying the navigable waters within the state's boundaries. *Pollard's Lessee*, 44 U.S. (3 How.) at 229 (1845); *Mumford*, 73 U.S. (6 Wall.) at 436 (1867); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 794 (9th Cir. 1982). Thus, states admitted to the Union after the Revolution, being entitled to the same rights as the original 13 states, were, like the original 13 states, entitled to the beds underlying navigable waterways. *Pollard's Lessee*, 44 U.S. (3 How.) at 228-229; *accord Montana v. United States*, 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981). In the newly admitted states, however, land not owned by the state generally was owned by the federal government. As a consequence, in the newly admitted states, the concept of navigability served the purpose of distinguishing not public from private, but rather state from federal. It is to be noted though that the public/private distinction still has relevance in the American law of title navigability. Under the Americanized version of the common law doctrine of navigability, by virtue of the rights gained in the Revolution and confirmed by the Constitution, it is the state, as opposed to the federal government, which holds title in public trust of "public waterbodies," and it is through application of the definition of navigability that the determination is made of which waterbodies are public and which are not.

The purpose then of the equal footing doctrine as applied to questions of title navigability is to ensure that all states are vested with the same right of safeguarding "public," that is "navigable," waterbodies. However, this conclusion says nothing about *how* navigability is to be

defined. On at least a theoretical level, defining navigability with reference only to the state of commerce at the time of statehood, as the United States urges this court to do, does not undermine the above described policies and purposes of the equal footing and navigability doctrines. If one were to accept the proposition that as the nature of commerce varies notions of what is "navigable" and hence "public" vary accordingly, it would follow that navigability should be determined with reference to the state of commerce at the time of statehood. The fact that each state has an equal right to the title of navigable or public waterbodies does not in and of itself compel the conclusion that the concept of what is "navigable," and hence "public," is static and non-malleable. In short, while it is clear the equal footing doctrine guarantees all states equal rights in navigable waterbodies, the doctrine does not guarantee that the concept of navigability is static and not subject to change over the years.

However, the United States fails to cite a case that supports the proposition that the elements of the *Daniel Ball* test concerning susceptibility of the waterway to use "as a highway for commerce," "in the customary modes of trade and travel" must be applied with reference to the nature of commerce and "the customary modes of trade and travel" at the time of statehood. The majority of courts which have applied the *Daniel Ball* test for the purpose of determining title, while careful to note that navigability is to be determined at the time of statehood, have not made or required specific findings with respect to the "customary mode of trade and travel" at the time of statehood. *See, e.g., Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971); *United States v. Utah*, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); *United States v Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1925); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 795 (9th Cir.1982). There is dictum in a couple of cases which could be construed as supporting the United States' position. *See North Dakota*

ex rel. Bd. of Univ. and State Lands v. Andrus, 671 F.2d 271, 278 (8th Cir.1982), *rev'd on other grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ. and State Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (". . . [W]e must bear in mind that the issue is one of potential commercial use and hence navigability at the time of statehood, not in the present day. . . . [C]anoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods."); *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir.), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985) (". . . [W]e have liberally construed the phrase 'customary modes of trade and travel on water,' [citations omitted], taking into account transportation methods in use at the time of statehood."). These cases, however, hold nothing more than that the "customary modes of trade and travel" at the time of statehood are relevant to the determination of title navigability. The cases do not hold, as the United States here contends, that a determination of title navigability depends exclusively on the customary modes of trade and travel in use at the time of statehood.

The case which sheds the most light on the relationship between the equal footing doctrine and the *Daniel Ball* title navigability test is *United States v. Utah*, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931). There, the United States had brought a quiet title action against the State of Utah claiming that portions of the Green, Grand and Colorado rivers were non-navigable. In taking exception to certain findings of navigability made by a special master, the United States argued that the absence of historical evidence of actual use by Indiana, fur traders, or early explorers was "weighty evidence" of non-navigability. Noting that the region at issue was unexplored at the time of statehood, the Supreme Court rejected this argument on the ground that a title navigability determination cannot be made to depend upon the relative development or

lack of development of a state at the time of its admission to the Union:

> It is true that the region through which the rivers flow is sparsely settled. . . . In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather it is true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the state either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as they may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

United States v. Utah, 283 U.S. 64, 83, 51 S.Ct. 438, 443-44, 75 L.Ed. 844 (1931).

The holding of the Supreme Court that a state's "equality of right as a state of the Union" is not to be denied because of the state's under-development at the time of statehood undermines the United States' contention that the determination of navigability is limited by "the customary mode of commerce" at the time of statehood. If a state's "equality of right as a state of the Union" is not to be denied because of a state's relative under-development at the time of statehood and if "the question [of title navigability] remains one of fact as to

the capacity of the rivers in their ordinary condition to meet the needs of commerce as these *may* arise," (emphasis added), it necessarily follows that neither the extent nor the nature of commerce in the region at the time of statehood is relevant to title navigability determinations. Rather, it appears that the Supreme Court in *United States v. Utah* approached the problem of title navigability with fixed, if unstated, concepts of "commerce" and "ordinary modes of commerce" in mind and simply held that those concepts of "commerce" and "ordinary modes of commerce" were to be applied to the river at issue without regard to the extent or nature of actual past or present commercial development in the region surrounding the river.

It must be noted that the Supreme Court in *United States v. Utah* found only that lack of actual navigation at the time of statehood on a waterbody due to the economic under-development of the region surrounding the waterbody is not evidence of non-navigability; the Supreme Court did not directly address the theoretical possibility that a state's right to the title to beds of navigable waterbodies is itself a relative right which varies according to existing concepts of what constitutes commerce, navigability and publicness. However, to the extent that the Supreme Court did not in *United States v. Utah* reject the application of this malleable concept of navigability in making title navigability determinations, this court, for the reasons set forth below, does.

On a purely theoretical level, the notion that as concepts of what constitutes commerce vary concepts of what is "navigable" vary accordingly has a certain appeal. As a practical matter, however, if such a malleable definition were given to the concept of navigability, the navigability or non-navigability of waterbodies, and hence title to those waterbodies, would be in constant flux. This would plainly be an untenable result. It might be argued that this problem could be solved by permanently fixing

title according to the navigability of the waterbody at the time of statehood. However, by making title a constant while at the same time using a malleable definition of navigability, and hence of title itself, an equally untenable situation results: as the nature of commerce and navigability changed, states would be found to have title to non-navigable waterways and without title to navigable waterways. This is, of course, contrary to what the law provides. Thus, as a purely practical matter, it does not make sense to fix title according to prevailing modes of conducting commerce at the time of statehood.

In sum, then, although there is little authority directly on point, the inference to be drawn from existing authority is clearly that the admonition of the equal footing doctrine that title is to be determined at the time of statehood does not mean that the "usual mode of commerce" element of the *Daniel Ball* test must be applied with reference to how commerce was conducted at the time of statehood. In addition, if the malleable, relativistic concept of navigability urged by the United States were adopted, title to waterbodies could not be kept constant without undermining the well established principle that the states hold title to the beds underyling navigable waterbodies. This court consequently concludes that the requirement that title navigability be determined at the time of statehood means only that when making a title navigability determination, the *Daniel Ball* test is to be applied to the physical dimensions and configuration of the river existing at the time of statehood.

Having concluded that the "commerce" and "ordinary modes of trade and travel" elements of the *Daniel Ball* test need not be construed with reference only to the "commerce" and "ordinary modes of trade and travel" in existence at the time of statehood, the court is left with the question of how those elements of the *Daniel Ball* test are to be defined and applied in a given case. Alaska advances in the alternative three independent arguments

concerning the application and definition of the commerce element of the test. Alaska's first argument is that the term "commerce" no longer has any application in title navigability determinations. As a fall back position, Alaska argues that commerce is not limited to "freight-hauling" activities, but rather encompasses activities such as fishing, camping, sightseeing, trapping, hunting and governmental activities. As a final alternative, Alaska argues that even if the foregoing non "freight-hauling" activities are not commerce, they constitute relevant evidence of a waterbody's susceptibility to bearing traditional forms of commerce. The United States does not dispute the validity of this third argument, nor does the court. *United States v. Utah*, 283 U.S. 64, 82-83, 51 S.Ct. 438, 443-444, 75 L.Ed. 844 (1931); *Utah v. United States*, 403 U.S. 9, 11, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971). The United States does dispute the first two arguments advanced by Alaska and those arguments will be addressed in turn.

Alaska contends that the key element of the federal title navigability test is not that the waterbody at issue be susceptible to commercial use, but rather that it be susceptible to utilization as a transportation route. At first glance, Alaska's position would seem to be contrary to all existing law. Indeed, the well established federal title navigability test explicitly provides that a waterbody is navigable if it is susceptible to being used as a "highway for commerce," and courts have consistently cited and applied this commercial use requirement when making title navigability determinations.

Nevertheless, the court finds substantial merit in Alaska's position. It is to be noted that the federal test essentially equates the use of a waterbody for transportation and as a "highway for commerce": ". . . as a highway for commerce, over which . . . trade *or* travel may be conducted. . . ." (emphasis added). This implicit equation between routes for travel and routes for conduct-

ing commerce comports with common sense notions of what is required to conduct commerce by means of a waterbody. It is difficult to imagine a situation in which a waterbody is susceptible to use as a transportation route yet not susceptible to use as a highway for commerce. The reverse situation, on the other hand, is not difficult to imagine and indeed is probably always the case: where a waterbody is not susceptible to use as a transportation route, it is highly unlikely that the waterbody is susceptible to use as a highway for commerce. As a practical matter then, requiring only that a waterbody be susceptible to use as a transportation route would rarely, if ever, alter the result of a given application of the *Daniel Ball* test. Although this court would not go so far as to hold that susceptibility to use as a highway for commerce is no longer required under the federal title navigability test, it appears to the court that the travel requirement ordinarily subsumes the commerce requirement and that as a consequence, the travel requirement is indeed "the essence of the federal test." *Utah v. United States*, 403 U.S. 9, 11, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971).

This analysis is supported by the facts and holding of the Supreme Court in *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971). There the United States contested a finding by a special master that the Great Salt Lake was navigable. The special master had found that the lake had been used by ranchers to transport livestock by boat from the mainland to an island in the lake. The United States contended that use of the waterbody for ranching was not evidence of commercial use. Rejecting this argument, the Supreme Court found that the feature which distinguishes between navigability and non-navigability is use of the waterbody as a "highway" and that the purpose for which travel is conducted on the waterbody is "an irrelevant detail":

> "The hauling apparently was done by the owners of the livestock, not by a carrier for the purpose of mak-

> ing money. Hence it is suggested that this was not use of the lake as a navigable highway in the customary sense of the word. . . . We think that is an irrelevant detail. The lake was used as a highway and that is the gist of the federal test." 403 U.S. at 11, 91 S.Ct. at 1776.

Likewise here, the court finds that the paramount consideration in applying the *Daniel Ball* test is whether the waterbody at issue is susceptible to use as a route for transportation.

By emphasizing the susceptibility of a waterbody to being used as a transportation route when applying the title navigability test, difficult questions regarding how the "commerce" element of the title test is to be applied are resolved in a manner which is both sensible and consistent with the policy considerations underlying the title navigability test. The nature of commerce and the manner in which it is conducted varies substantially from historical period to historical period and from geographical region to geographical region. As a consequence, emphasis of the "commerce" element of the title navigability test would lead to widely varying results depending on where and when the title test was applied. This, as demonstrated above, is an undesirable result because it would undermine the stability of title determinations as well as the equality of the states' right to hold the title in public trust. By emphasizing the capability of the waterbody to serve as a route for transportation, these problems are avoided. Regardless of region or historical period, craft capable of providing transportation must be of a certain minimum size. Assuming, as this court does, that a waterbody capable of serving as a transportation route is in the ordinary case also susceptible to use as a highway for commerce, the task then of a court in applying the "highway for commerce" element of the *Daniel Ball* test is much simplified. When determining the title navigability of a waterbody in this manner a court need not specifically

concern itself with when and how commerce has or could be conducted in the region surrounding the waterbody; rather the court need only inquire if the waterbody is susceptible to the most basic form of commercial use: the transportation of people or goods.

The effect of equating a waterbody's susceptibility to use as a transportation route and its susceptibility to use as a "highway for commerce" is to define commerce in its most elemental form and disregard the regional and historical variations in the manner in which it is conducted. There is nothing, however, in the historical development of the title navigability test that indicates that navigability should depend on the regional and historical characteristics of the commerce conducted in the area surrounding the waterbody. As pointed out above, the concept of navigability was developed to distinguish that which can be privately owned from that which is to be held in public trust by the sovereign. Underlying the use of the concept of navigability to distinguish between public and private is the notion that large waterbodies subject to commercial exploitation should be kept public while waterbodies so small as to not be useful for commercial transportation are suitable for private ownership. MacGrady, *The Navigability Concept in the Civil and Common Law*, 3 Fla.St. U.L.Rev. 511, 574-575 (1975). This policy, however, is not served by declaring a waterbody capable of transporting goods non-navigable simply because commerce in the region at that time is customarily conducted in vessels too large for the waterbody. *See, e.g., The Montello*, 87 U.S. (20 Wall.) 430, 441, 22 L.Ed. 391 (1874) ("It would be a narrow rule to hold that . . . unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."). This is undoubtedly why the *Daniel Ball* test provides that a waterbody need only be "susceptible" to use as a highway for commerce. As pointed out above, when a waterbody is susceptible to use as a conduit for transportation

of any substantial sort, it generally will also be susceptible to use as a highway for commerce.

Alaska's second argument, is, as indicated above, that "commerce" is not limited to freight hauling activities, but rather encompasses activities such as fishing, camping, sightseeing, trapping, hunting and governmental activities such as surveying and enforcement of game laws. As the court understands it, Alaska's argument here is not that these are activities which when conducted on a waterbody are evidence of commercial use of the waterbody. Rather, it appears that Alaska is arguing that utilization of a waterbody is an artery of transportation for the purpose of conducting these activities constitutes use of the waterbody as a "highway for commerce." So construing Alaska's argument, the analysis applied by the court with respect to Alaska's first argument is equally applicable here: when a waterbody is susceptible to being used as a route for transporting people or goods, it generally will also be susceptible to use as a "highway for commerce." Again, in the court's view, in the ordinary case there is no material difference between susceptibility to use as a route of transportation and susceptibility to use as a "highway for commerce." As a consequence, it is unnecessary for the court to decide if utilization of a waterbody as an artery of transportation for the purpose of reaching fishing, trapping or game spots is actual use of the waterbody as a "highway for commerce" or merely evidence of the waterbody's susceptibility to use as a "highway for commerce"; where a waterbody is used as a transportation route, for whatever purpose, ordinarily the waterbody will also be susceptible to use as a highway for commerce. As is well established, susceptibility of a waterbody to use as a highway for commerce in the absence of actual use as a highway for commerce suffices to establish navigability. *United States v. Utah*, 283 U.S. 64, 83, 51 S.Ct. 438, 443-444, 75 L.Ed. 844 (1931). The court does note, however, that when a waterbody is utilized as a means of trans-

portation for conducting some of the activities referred to in Alaska's second argument there may be instances when there is no longer an essential equivalence between use of the waterbody as a route of transportation and the susceptibility of the waterbody to use as a "highway for commerce." It is easy, for example, to imagine a situation in which a fishing or trapping site near a waterbody could be reached only with a single person kayak. Because it is doubtful whether commerce can be conducted in a single person kayak, the fact that the waterbody was used as a highway for reaching the fishing or trapping spot might not necessarily support a finding that the waterbody was susceptible to use as a highway for commerce. In such a case, it would then be necessary to decide the issue of whether utilization of a waterbody as a "highway for reaching fishing spots" is the equivalent of utilization of the waterbody as a highway for commerce. The facts of this case are not such that the court need decide this issue.

In sum then, the title navigability of a particular waterbody is not dependent on the nature of commerce conducted in the region surrounding the waterbody at a given time. A waterbody which is capable of transporting people or goods will in the ordinary case also be susceptible to use as a "highway for commerce." With these precepts in mind, the court now turns to the facts of this case.

Ahtna, Inc. and Alaska have entered into extensive stipulations of fact concerning the physical configuration of the portion of the Gulkana River here at issue and the uses to which it has been put.[10] These factual stipulations

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[10] While the United States has not joined in this stipulation, it has represented to the court that it is "willing" to do so. United States' Opposition to Alaska's Motion for Reconsideration at 7. Whether the United States does or does not actually join in the stipulation is not crucial however because the United States has not disputed Ahtna's and Alaska's description of the physical characteristics of the lower 30 miles of the Gulkana.

provide more than a sufficient basis for applying the legal principles the court has concluded to be applicable in this case. Consequently, resolution of this case on the cross motions before the court is appropriate. *See Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 794 (9th Cir. 1982).

In view of the stipulated facts, there is no question that the portion of the Gulkana River here at issue (hereinafter the court will refer to the portion of the river at issue as simply "the river" or "the Gulkana") is capable of transporting people and goods and consequently is "susceptible to use as a highway for commerce." Much of the river is ordinarily slow moving and 3-6 feet deep and about 150 feet wide. Other areas are characterized by unbroken, comparatively fast running (2-3 m.p.h.) waters 2-4 feet deep under average conditions. These stretches are interrupted by shorter segments of alternating riffles and pools. In a three mile stretch between points 7.5 miles and 10.5 miles above the river's confluence with the Copper River there are segments ranging from just a few feet to a couple hundred feet in length which contain standing waves up to three feet high, capable of swamping an open canoe in places and requiring maneuvering to avoid. These waves are no obstacle to other more stable watercraft such as riverboats and inflatable rafts which are larger and wider than canoes.

The shallowest spot reported is a gravel shoal area a couple hundred feet long located about a quarter mile above the Richardson Highway Bridge (3.75 miles above the Gulkana's confluence with the Copper River) crossing the Gulkana River. At this spot the water depth is normally about a foot and a half deep, and it can drop down to a foot during low water conditions which sometimes occur after mid-July. Just below the Richardson Highway Bridge, there is another gravel shoal maybe 50 feet long where the deepest channel, to the right side of the river heading downstream, is normally about two feet

deep. The water level at this spot sometimes drops to 16-18 inches after mid-July and at times drops another 3 to 4 inches in late August or September. Below this point the entire river slows and is several feet deep as it approaches its confluence with the Copper River.

There could be some question as to whether the river is navigable in its shallowest spot, that is, the couple of hundred feet stretch above the Richardson Highway Bridge where the water is normally only a foot and a half deep and at times only a foot deep.[11] This stretch, however, is very short and neither the United States nor Ahtna, Inc. has produced any evidence that navigation over this stretch is not possible. Moreover, it is well established that "navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122, 41 S.Ct. 409, 412, 65 L.Ed. 847 (1921); *accord North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus*, 671 F.2d 271, 277 (8th Cir.1982), *rev'd on other grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983); *United States v. Utah*, 283 U.S. 64, 86-87, 51 S.Ct. 438, 444-445, 75 L.Ed. 844 (1931); see *United States v. Holt State Bank*, 270 U.S. 49, 56-57, 46 S.Ct. 197, 199-200, 70 L.Ed. 465 (1925) (waterbody at issue

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[11] It is axiomatic that navigability is a question of fact, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870), and that as a consequence analogies to other waterways found to be navigable are not always helpful. Nevertheless, the court would note that even the most difficult passage of the portion of the Gulkana at issue here compares favorably with waterbodies found to be navigable in other cases. *See, e.g., North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus*, 671 F.2d 271 (8th Cir. 1982), *rev'd on other grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (Little Missouri River found navigable despite report that maximum depth of river was two and one-half feet).

found navigable despite difficulties to navigation posed by sand bars and vegetation); *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 795 (9th Cir.1982) (portion of McKenzie river found navigable as a matter of law despite fact that portion of river at issue at times had exposed gravel bars, boulders and shoals). Thus, even assuming that navigation of the short stretch of shallow water above the Richardson Highway Bridge might be difficult, the impediment to navigation posed by the stretch is not of sufficient magnitude to compel a finding that the river is non-navigable.

Any concern that any segment of the river is non-navigable is put to rest by the evidence concerning the various uses that have actually been made of the river. The first reported use [12] of this section the Gulkana River is one told by Ahtna Natives of a short-statured Gulkana area chief who traded copper for furs with the Tanana people at Isabel Pass (9 miles north of Paxson Lake), had the furs loaded into Native boats, and then transported them down the Gulkana River to a village for redistribution to other Ahtna groups in the Copper River Valley. The village was reportedly located at the combined mouths of Bear Creek and the Gulkana River, about

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[12] Ahtna, Inc. and Alaska have stipulated that the "natural and ordinary condition of the [Gulkana Rivers System] is the same now as it was at statehood in terms of location and general physical characteristics such as water volume, gradients, geology and general weather and water level conditions." Stipulation of Facts, filed November 21, 1984, at p. 8. There is nothing in the record to indicate that the physical characteristics of the Gulkana were at any time prior to statehood significantly different than they are at present. As a consequence, when considering evidence of actual use of the Gulkana in determining whether the Gulkana was susceptible at the time of statehood to use as a "highway for commerce," it is irrelevant when the actual use occurred. *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 795 (9th Cir. 1982); *see Utah v. United States*, 403 U.S. 9, 9-10, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971); *United States v. Utah*, 283 U.S. 64, 82, 51 S.Ct. 438, 443-444, 75 L.Ed. 844 (1931).

2.3 miles above the river's confluence with the Copper River. This story, set in the late 1700's or early 1800's, is not documented, but is considered historical by the Ahtna who tell it. It is known that for the period of the story the Ahtna had villages and hunting camps within the Gulkana River drainage, that inter-tribal trade existed between the Ahtna and other native groups, and that the commonly shared Ahtna technology included canoe-type craft constructed by birch bark or animal skins sewn together over a wooden frame. These crafts were customarily about 17 feet long, 4 feet wide and 2 feet deep. The craft were primarily used for down stream travel.

Today watercraft are commonly used within this 30 mile section of river in connection with the fishing and camping activities which take place within the river corridor. Travel on this section is most frequently between the Sourdough Campground (33 miles above the confluence of the River with the Copper River) and the Richardson Highway Bridge, which provide access to the river by road. Use of watercraft between the bridge and the confluence of the river with the Copper River is also prevalent. These river stretches are customarily used, and susceptible to use, by the following craft: (1) powered square-sterned flat-bottomed riverboats and skiffs and V-nosed round bottomed lake boats, most commonly constructed of aluminum but also fiberglass or wood, between 16 to 24 feet long by 4 to 10 feet wide, capable of carrying loads ranging between 900 and 2,000 pounds on the river, with the draft for the metal boats of this type commonly running between 3-6 inches unloaded and 2-4 inches more when loaded to capacity and sitting still in the water, and powered by contemporary jet units, large outboard propeller motors or air propeller engines which can reduce or increase the real draft of the boat once under power; (2) inflatable rafts most commonly ranging between 12 and 15½ feet long and 5 to 7 feet wide, with a river load capacity between 1,250-2,000 pounds and a draft of 6-8 inches when loaded to capacity, and used

almost exclusively for downstream travel using rowing frames and oars; (3) square-sterned motorized freight canoes and double-ended paddle canoes 15 to 19 feet long.

Most travel within this section is by recreationalists in their own craft to reach fishing and camping spots on the river between the mouth and Sourdough. Traffic is most pronounced during mid-June through July, while the salmon are running in the river. During a busy weekend day between a dozen and 20 boats carrying 60 or so people are commonly in use within this section. Powerboats are the craft most commonly used, followed by inflatable rafts and canoes.

Facts in addition to the above are stipulated to by Alaska and Ahtna, Inc. It is not necessary, however, to reiterate those additional facts because the facts already recited are more than sufficient to support a finding that the portion of the Gulkana River here at issue is susceptible to use as a highway for commerce, over which trade or travel may be conducted in the customary modes of trade or travel on water.[13] Accordingly, the court, finding the lower 30 miles of the Gulkana River to be navigable as a matter of law, hereby GRANTS the

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[13] The Gulkana is frozen over approximately six months out of the year. Stipulation of Facts, filed November 21, 1984, at p. 7. However, it is well established that climatic changes rendering a waterbody non-navigable on a seasonal basis do not preclude a finding of overall navigability. *Oregon v. Riverfront Protection Ass'n.*, 672 F.2d 792, 795 (9th Cir. 1982); *North Dakota ex rel. Bd. of Univ. and School Lands v. Andrus*, 671 F.2d 271, 277-278 (8th Cir. 1982) *rev'd on other grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). Thus, in light of the above finding that the Gulkana is navigable when not frozen over, it is not necessary for the court to decide whether evidence of ice use can be admitted to prove navigability. The court would observe, however, that the holding of the Ninth Circuit in *Alaska v. United States*, 754 F.2d 851 (9th Cir.), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333, 88 L.Ed.2d 317 (1985), would appear to preclude admission of evidence of ice use.

State of Alaska's motion for summary judgment and DENIES the United States' cross motion for judgment on the pleadings.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. A80-359 Civ (Gulkana River)

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA, DONALD HODEL, Secretary of the Interior; ROBERT PENFORD, Alaska State Director, Bureau of Land Management; AHTNA, INC., and STA-KEH CORPORATION,

Defendants.

FINAL JUDGMENT

[Filed April 22, 1987]

This matter came before the Court as an action filed by the State of Alaska against the United States of America, Department of Interior officials, Ahtna, Inc. and Sta-Keh Corporation. The State of Alaska moved for summary judgment and the United States, joined by Ahtna, Inc., cross moved for judgment on the pleadings. Concurrently herewith the Court is filing its Second Amended Order granting the State of Alaska's motion for summary judgment, denying the United States' cross motion for judgment on the pleadings, and finding the portion of the Gulkana River contained within the conveyance of purported title to Ahtna, Inc. and Sta-Keh Corporation to be navigable as a matter of law.

Accordingly, the issues having been considered and a decision having been rendered,

IT IS HEREBY ORDERED AND ADJUDGED:

1. The United States of America, Aetna, Inc. and Sta-Keh Corporation have no ownership of or interest in title to the bed of the portions of the Gulkana River system purportedly conveyed by the United States to Sta-Keh Corporation by interim conveyance No. 209, dated June 29, 1979.

2. The portion of the interim conveyance No. 209 by the United States of America to Sta-Keh Corporation, dated June 29, 1979, which purports to convey title to the bed of the Gulkana River to Sta-Keh Corporation (since merged into Ahtna, Inc.) is declared null and void and without effect, and the same is ordered cancelled.

The Clerk of the Court is directed to enter this Final Judgment forthwith.

Dated: April 16, 1987

/s/ Laughlin E. Waters
LAUGHLIN E. WATERS
Sr. United States District Judge

June 04, 1987

Total costs taxed in favor of Plaintiff and against the U.S. in the amount of $3,602.49 representing the amount allowed herein and the amount of $716.50 allowed May 12th.

APPENDIX D

STATUTORY PROVISIONS

THE SUBMERGED LANDS ACT OF 1953
43 U.S.C. sec. 1311

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof:

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; . . .

(d) Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve nevigation, or to provide for flood control, or the production of power;

(e) Nothing in this subchapter or subchapter I of this chapter shall be construed as affecting or intended to

affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use and distribution of such waters shall continue to be in accordance with the laws of such States.

THE ALASKA STATEHOOD ACT
48 U.S.C. note prec. sec. 21

Sec. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right of title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority except to such extent as the Congress has prescribed or may hereafter prescribe . . . .

Sec. 6 . . .

(b) The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within thirty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection; . . .

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

THE ALASKA NATIVE CLAIMS SETTLEMENT ACT
43 U.S.C. secs. 1601 *et seq.*

Sec. 1601. Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, . . .

Sec. 1602. For the purposes of this chapter, the term—

. . . (e) "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended, or identified for selection by the State prior to January 17, 1969; . . .

Sec. 1603.

(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

. . .

Sec. 1610.

(a)(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3)(A) If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriate public lands. . . .

(b) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that—

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Sec. 1611.

(a)(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title; . . .

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever, feasible, in units of not less than 1,280 acres. *Provided*, That the Secretary in his discretion and upon the request of the concerned Village Corporation, may waive the whole section requirement where—

(A) (i) a portion of available public lands of a section is separated from other available public lands in the same section by lands unavailable for selection or by a meanderable body of water; . . .

Sec. 1612.

(a) The Secretary shall survey the areas selected or designated for conveyance to Village Corporations pursuant to the provisions of this chapter. He shall monument only exterior boundaries of the selected or designated areas at angle points and at intervals of approximately two miles on straight lines. No ground survey or monumentation will be required along meanderable water bodies. . . .

Sec. 1616.

(d) (2) (E) Notwithstanding any other provision of this subsection, initial identification of lands desired to be selected by the State pursuant to the Alaska Statehood Act and by the Regional Corporations pursuant to section 1611 of this title may be made within any area withdrawn pursuant to this subsection (d), but such lands shall not be tentatively approved or patented so long as the withdrawals of such areas remain in effect: *Provided*, That selection of lands by Village Corporations pursuant to section 1611 of this title shall not be affected by such withdrawals and such lands selected may be patented and such rights granted as authorized by this chapter. . . .

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

43 U.S.C. secs. 1631 *et seq.*

Sec. 1631.

(a) Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settle-

ment Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after December 2, 1980, or within seven years after December 2, 1980, if the interim conveyance was executed on or before December 2, 1980. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after December 2, 1980, or within seven years after December 2, 1980, if the patent was executed on or before December 2, 1980. The civil action described in this subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action.

(b) No agency or board of the Department of the Interior other than the Bureau of Land Management shall have authority to determine the navigability of water covering a parcel of submerged land selected by a Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act unless a determination by the Bureau of Land Management that the water covering a parcel of submerged land is not navigable was validly appealed to such agency or board prior to December 2, 1980. The execution of an interim conveyance or patent by the Bureau of Land Management conveying a parcel of submerged land to a Native Corporation or Native Group shall be the first agency action with respect to a decision by the Secretary of the Interior that the water covering such parcel is not navigable, unless such decision was validly appealed prior to December 2, 1980, to an agency or board of the Department of the Interior other than the Bureau of Land Management.

(c) If the court determines that a parcel of submerged land which is the subject of a civil action described in

subsection (a) of this section is owned by the Native Corporation or Native Group to which it was conveyed pursuant to the Alaska Native Claims Settlement Act or this Act, each defendant Native Corporation and Native Group shall be awarded a money judgment against the plaintiffs in an amount equal to its cost and attorney's fees, including costs and attorney's fees incurred on appeal.

(d) No Native Corporation or Native Group shall be determined to have been conveyed its acreage entitlement under the Alaska Native Claims Settlement Act until—

(1) the statutes of limitation set forth in subsection (a) of this section have expired with respect to every parcel of submerged land conveyed to such Corporation or Group; and

(2) a final judgment or order not subject to an appeal has been obtained in every civil action filed pursuant to subsection (a) of this section.

(e)(1) Whenever a parcel of submerged land to be conveyed to a Native Corporation or Native Group is located outside the boundaries of a conservation system until such Corporation or Group and the State of Alaska may mutually agree that such parcel may be selected by and conveyed to the State under the provisions of section 6(b) of the Alaska Statehood Act.

(2) In any instance in which the State could have selected a parcel of submerged land pursuant to an agreement between the State and a Native Corporation or Native Group pursuant to paragraph (1) if such parcel had not previously been conveyed to such Corporation or Group, such Corporation or Group is authorized to reconvey such parcel to the Secretary, and the Secretary shall accept such reconveyance. If the surface estate and subsurface estate of such parcel are owned by different Native Corporations or Native Groups, every Corporation and Group with an interest in such parcel shall reconvey its entire interest in such parcel to the Secretary.

(3) In any agreement made between a Native Corporation or Native Group and the State of Alaska pursuant to paragraph (1), and in any reconveyance executed by a Native Corporation or Native Group pursuant to paragraph (2), each affected Corporation or Group shall disclaim its interest in the parcel which is the subject of the agreement or reconveyance. If such parcel underlies a lake having a surface area of fifty acres or greater or a stream having a width of three chains or greater, the Secretary shall determine the acreage contained in the parcel. If such parcel underlies a lake having a surface area of less than fifty acres or a stream having a width of less than three chains, the Secretary, the State, and the affected Native Corporation or Native Group shall determine the acreage contained in the parcel by mutual agreement. The affected Native Corporation or Native Group shall receive replacement lands in an amount equal to the acreage of the parcel as determined by the process set forth in this paragraph.

(4) Upon receipt by the Secretary of an agreement executed pursuant to paragraph (1) or a reconveyance executed pursuant to paragraph (2), the parcel which is the subject of the agreement or reconveyance shall be deemed vacant, unappropriated, and unreserved public land available for selection by the State pursuant to section 6 of the Alaska Statehood Act, and the State is authorized to file a land selection application for such parcel pursuant to section 6(b) of the Alaska Statehood Act. The acreage within such parcel shall be charged against the State's land entitlement. If the water covering a parcel of submerged land selected by or conveyed to the State pursuant to this subsection is later determined by a court of competent jurisdiction to be navigable and title to such parcel to be vested in the State pursuant to section 6(m) of the Alaska Statehood Act, such selection or conveyance shall not diminish the State's land entitlement under section 6(b) of the Alaska Statehood Act, nor shall such judicial determination of navigability affect the land entitlement

of any Native Corporation or Native Group pursuant to the Alaska Native Claims Settlement Act. Land selections made by the State pursuant to this subsection shall not be subject to the size limitations of section 6(g) of the Alaska Statehood Act or this Act. Notwithstanding the survey requirements of section 6(g) of the Alaska Statehood Act and section 13 of the Alaska Native Claims Settlement Act, no ground survey or monumentation shall be required on any parcel selected by and conveyed to the State or excluded from a conveyance to any Native Corporation or Native Group pursuant to this subsection.

(5) Any Native Corporation or Native Group which is entitled to receive conveyance of replacement acreage in lieu of acreage within a parcel of submerged land relinquished or reconveyed pursuant to this subsection shall receive conveyance of such replacement acreage from among existing selection made by such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act. If such selections are insufficient to fulfill the acreage entitlement of such Corporation or Group pursuant to the Alaska Native Claims Settlement Act, the provisions of section 1410 shall apply to such Corporation or Group, but no land within the boundaries of a conservation system unit shall be withdrawn for such Corporation or Group pursuant to section 1410 unless such land was withdrawn under section 11(a) of the Alaska Native Claims Settlement Act. Any replacement acreage conveyed to a Native Corporation or Native Group from lands withdrawn pursuant to section 1410 shall be subject to the provisions of section 12, 14, 16, 17, and 22 of the Alaska Native Claims Settlement Act.

(f) The procedures and statutes of limitation set forth in this section shall not apply to administrative or judicial determinations of the navigability of water covering a parcel of submerged land other than a parcel conveyed to a Native Corporations or Native Group pursuant to the Alaska Native Claims Settlement Act or this Act.

(g) As used in this section, the terms "navigable" and "navigability" means navigable for the purpose of deter-

mining title to lands beneath navigable waters, as between the United States and the several States, pursuant to the Submerged Lands Act of 1953, and section 6(m) of the Alaska Statehood Act.

(h) Notwithstanding any other provision of law, any civil action contesting the legality or authority of the United States to legislate on the subject matter of this section shall be barred unless the complaint is filed within one year after December 2, 1980. The purpose of this limitation on suits is to ensure that, after the expiration of a reasonable period of time, the right, title, and interest of Native Corporations and Native Groups in submerged lands conveyed to them under the Alaska Native Claims Settlement Act and this Act will vest with certainty and finality and may be relied upon by such Corporations and Groups and all other persons in their relations among themselves and with the State and the United States.

ALASKA CONSTITUTION

Article VIII

Section 3. Wherever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use.

Section 14. Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.